

February 17, 2011

RE: HB 518, mental health care advance directive

Chairman Peterson and Members of the Committee,

Last spring, DRM convened a meeting of about 20 consumers, family members, hospital and mental health center administrators, mental health professionals, and a suicide hot line volunteer from every corner of Montana and asked, "Does Montana need a mental health care directive, and if so, what should it look like?"

The group agreed unanimously on these points:

- There is an urgent need for a mental health advance directive. Directives could help people receive care before they become so ill that they meet civil commitment criteria.
- The person who creates the directive must be able to make it irrevocable at times of incapacity. Currently, it isn't legally possible to create a treatment directive that is irrevocable at times of incapacity.
- The directive must be able to stand on its own as a means of providing advance consent to care, even if there is no agent.
- The directive must be able to furnish advance consent to inpatient care.
- The directive must be able to influence the incapacity determination by describing criteria that the principal considers relevant. The consumers were very clear that they wanted providers to understand that loss of capacity is a very individual matter and occurs far earlier than the full-blown crisis that usually gets the attention of the healthcare system. This went to the very heart of the hopes that consumers expressed for advance directives: being able to get care sooner, as well as getting more effective care.

It's helpful to think of MH advance directives as "the missing piece." When people have capacity, they can make their own healthcare decisions. When they are in crisis and a danger to themselves or others, or unable to care for themselves, the state can step in and appoint a guardian or order civil commitment. Directives fill a legal void and allow providers of mental

health care to provide treatment without waiting for someone to get sick enough to be civilly committed.

The mental health advance directive does not change other laws. It does not change civil commitment law, guardianship law or criminal law. Advance directives

Nor does an advance directive change medical reality. Doctors must adhere to the applicable standard of care and respond appropriately if there is an emergency. An advance directive does not make up for a lack of insurance, failure to meet admissions criteria, or lack of providers who are willing or able to treat. No one has to provide care that is outside the scope of practice.

The consumers and families who have asked DRM over the years to help develop an advance directive are not looking for a panacea. They were just looking for another tool. Advance directives are one of those tools that work in some surprising ways: They foster conversations and so build relationships; they promote personal responsibility and autonomy and so decrease feelings of helplessness and fear.

We make no claims that HB 518 is a perfect bill. Consumers and doctors may discover flaws, and we will have to ask you to fix them in two years. But it does have a place among the legislative initiatives that since 2005 have been transforming the mental health system into an increasingly community-based and comprehensive system of care that includes local crisis response capacity and other cost-effective mechanisms for keeping people at home and in recovery.

Thank you for this hearing and thank you for support HB 518.

Anita Roessmann
Staff Attorney

A handwritten signature in cursive script, appearing to read "Anita Roessmann", written in dark ink.

Montana Code Annotated 2009

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53-21-153. Mental health advance directive authorized -- content -- cause of action created --

definitions. (1) An individual 18 years of age or older with mental capacity may voluntarily execute a mental health advance directive providing that if the individual is treated for a mental disorder at an inpatient facility, the directions concerning who must be notified and who may visit the individual, as provided in this section, are to be followed. An inpatient facility that is furnished a copy of a mental health advance directive shall comply with the directive and shall make the directive a part of the individual's medical record.

(2) The directive may address any combination of the following subjects:

(a) who should be notified promptly in the event of the individual's admission to or treatment at the facility;

(b) who should or should not be allowed to visit the individual at the facility; and

(c) the duration of the directive.

(3) The directive authorized in subsection (1) must be in writing and must contain:

(a) a statement that the individual has the mental capacity to execute the directive and that the directive is executed voluntarily;

(b) a statement that once signed, a directive of which the facility is furnished a copy takes effect upon the determination of the lack of mental capacity by the treating mental health professional of the individual and remains in effect until:

(i) revoked by the individual, orally or in writing, at a time that the individual has the mental capacity to revoke the advance directive, as determined by the treating mental health professional;

(ii) the directive expires by its own terms; or

(iii) the individual dies;

(c) the signature of the individual; and

(d) the signature of two witnesses.

(4) (a) An individual may revoke a mental health advance directive provided that the mental health professional chosen by or provided for the individual determines in good faith that the individual has sufficient mental capacity to revoke the directive. The inpatient facility shall make a valid revocation a part of the individual's medical record.

(b) An advance directive is valid and enforceable only with respect to the matters provided for in subsection (2) even if the directive addresses subjects in addition to those provided for in this section.

(5) If an inpatient facility fails to act in accordance with a mental health advance directive of which the facility was furnished a copy, an individual who has executed the mental health advance directive or who has the right to be notified or to visit the individual at the facility pursuant to a mental health advance directive has a cause of action against the facility for injunctive relief and reasonable costs and attorney fees incurred in bringing the action.

(6) As used in this section, the following definitions apply:

(a) "Advance directive" or "directive" means a writing complying with the requirements of this section.

(b) "Inpatient facility" or "facility" means a health care facility that provides emergency, crisis, or acute care to a person with a mental disorder.

(c) (i) "Lack of mental capacity" means that an individual does not have sufficient ability to make or communicate decisions regarding a need for treatment.

(ii) The lack of mental capacity does not require that a person be legally determined to be an

Questions about psychiatric advance directives

Number of states where the answer is "Yes"

Does the state statute allow me to write separate legal advance instructions for my future mental health treatment?

46

Does the state statute allow me to appoint a healthcare agent to make at least some mental health treatment decisions for me?

49

Can I write mental health advance instructions only on a form appointing a health care agent?

18

Does the state statute require that I have both an advance instruction (or "declaration") and a healthcare agent in order for my PAD to be legal?

2

Can I document advance preferences or consent for medications?

46

Can I document advance refusal of medications?

44

Can I document advance preferences or consent for hospitalization?

39

Can I document advance refusal of hospitalization?

33

Does the state statute require that a qualified mental health professional certify that I am competent to complete a PAD?

2

Does the state statute require that a qualified mental health professional pre-approve any of the content of my PAD, i.e., its appropriateness?

2

Does a court have to determine that I am legally incompetent in order for my PAD to go into effect during a crisis?

3